Can an Inspector review an Appropriate Assessment?

This was the question posed by Natural Resources Wales (NRW) in a recent successful appeal by Neyland Yacht Haven against conditions that had been attached to a dredging licence issued to permit maintenance dredging activities within a Special Area of Conservation pursuant to the Marine and Coastal Access Act 2009. The position adopted by NRW was that an Inspector had no right to "re-open […] the Respondent's [NRW's] appropriate assessment."

The matter was raised in a letter sent shortly before the hearing, in argument at the hearing and then again in a post-hearing letter. In summary, it was contended that the only challenge that could be brought against an 'Appropriate Assessment' prepared by them as the competent authority for the purposes of the Conservation of Habitats and Species Regulations (2017)[1], could be by challenge through judicial review. It was further argued that the Inspector on Appeal was only entitled to review the 'Appropriate Assessment' if it offended the 'Wednesbury reasonableness' test[2].

In support of the submissions NRW sought to rely on a number of cases, including the judicial reviews in R (on the application of Foster) & Anr v Forest of Dean District Council [2015][3], Smyth v Secretary of State for Communities and Local Government [2015][4] , and the Supreme Court case of Scottish origin in RSPB v Scottish Ministers [2017][5].

It was argued that the judgement handed down by Mr Justice Cranston in R (on the application of Foster) & Anr v Forest of Dean District Council[6] that included the following passages:

> *"Ms Wigley submitted that, in the light of this passage, a Wednesbury standard of review by this court would not reflect European law: it was clear that it is for the national court to establish whether the assessment of the implications for the SAC meets the requirements.*
>
> *To my mind there is an air of unreality about this submission. The CJEU could not have been suggesting that, as Ms Wigley submitted, national courts themselves must decide when the assessment has lacunae, whether it contains complete, precise and definitive findings, and whether its conclusions are capable of removing all reasonable scientific doubt as to the effects of the works proposed on the protected site concerned. Judges may be clever, but not that clever. The submission also misunderstands the role of courts in European societies. To my mind the CJEU was simply stating that the national court had to evaluate the assessment in the ordinary way, not become the primary decision-maker."*

could be interpreted as removing the role of an appellate body from re-considering an 'Appropriate Assessment.'

What is the role of the Inspector appointed to conduct an Appeal in circumstances where the conclusions of the 'Appropriate Assessment' are challenged?

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[1] SI: 2017:1012
[2] Associated Provincial Picture Houses v Wednesbury Corporation [1948] 1 KB 223
[3] R (on the application of Foster) & Anr v Forest of Dean District Council [2015] EWHC 2648
[4] Smyth v Secretary of State for Communities and Local Government [2015] EWCA Civ 174
[5] RSPB v Scottish Ministers [2017] CSIH 31
[6] Paras 22 and 23

The power and responsibility to conduct an 'Appropriate Assessment' in England and Wales falls to a 'competent authority' – defined by Regulation 7(1) of the Conservation of Habitats and Species Regulations (2017) as including:

> *(a) any Minister of the Crown (as defined in the Ministers of the Crown Act 1975), government department, statutory undertaker, public body of any description or person holding a public office;*
>
> *(b) the Welsh Ministers; and*
>
> *(c) any person exercising any function of a person mentioned in sub-paragraph (a) or (b).*

In relation to the powers of NRW to grant Marine licences, these were delegated by the Welsh Ministers as an 'appropriate licensing authority' under delegation order made pursuant to Section 98 of the Marine and Coastal Act 2009. Analogous provisions apply to MMO powers.[7] NRW are therefore both the delegated 'licensing authority' with power to issue licenses, and delegated 'competent authority' competent authority to make the 'Appropriate Assessment' where required.

In an Appellate role an Inspector becomes a person appointed by the Welsh Ministers in accordance with Regulation 5 of the The Marine Licensing (Appeals Against Licensing Decisions) (Wales) Regulations 2011 with power to determine the Appeal conferred by Regulation 8.[8] The Inspector is a 'competent authority' under the powers delegated under regulation 7(1)(c) of the Conservation of Habitats and Species Regulations (2017).

In short, the Inspector has exactly the same delegated authority from the Welsh Ministers, as the NRW, except with the authority to determine the appeal. On appeal, the delegated power of the Welsh Ministers shifts from NRW to the Inspector as both licensing authority and competent authority in relation to 'Appropriate Assessments.'

It appears that the confusion inherent in the NRW submissions was predicated on a fundamental misunderstanding of the role of the High Court in a judicial review. The role of the High Court is never to form an assessment of the evidence itself, unless the challenge is on the basis of Wednesbury unreasonableness, but to ensure that the correct processes have been followed in reaching the decision(s) taken. It is not concerned with whether the decision reached is believed to be 'right or wrong' which would require the court to enter into the decision maker role themselves.

Curiously, one of the cases cited by NRW in their submissions was Smyth v Secretary of State for Communities and Local Government [2015].[9] A brief outline of the relevant parts of that case are as follows: A planning application was made and refused by a local authority, relying upon an 'Appropriate Assessment' created on their behalf. The Applicant appealed to an inspector who adjourned the resulting Public Inquiry, permitting the appellant to obtain their own expert ecological evidence. That evidence was given and accepted by the Inspector on Appeal who proceeded to allow the Appeal with various conditions being put in place to deal with the potential harm to the affected

[7] The power of local authorities and many other English planning authorities to conduct Appropriate Assessments are contained within Reg 7 Conservation of Habitats and Species Regulations (2017).
[8] 2011 No 925 (W.134)
[9] Smyth v Secretary of State for Communities and Local Government [2015] EWCA Civ 174

sites. The Inspector, having considered the scientific evidence, concluded that no 'Appropriate Assessment' was in fact required at all.[10] The court went on to consider the criteria that the Inspector ought to have applied in his consideration of the environmental risks and found that, considering the Wednesbury reasonableness challenge to the Inspector's decision, *"the Appellant's complaint that the Inspector did not have information before him which he could rationally and lawfully regard as 'objective information' and 'the best scientific knowledge in the field' for the purposes of proceeding under art 6(3) should be rejected*."[11]

In Smyth the court (Sales LJ at para 95), in terms, accepted the role of the Inspector as the competent authority and accepted that s/he may be better informed than the original decision-maker. Sales LJ said:

> *"This leads to the second preliminary point. In this case the relevant competent authority (the Inspector) was conducting an inquiry for the purposes of art 6(3) which to a significant degree was informed by work done for a different body (the Council) at the stage when the Council was the relevant competent authority to consider matters, as the local planning authority considering at the earlier stage whether it should grant planning permission. Also, by the time of his inquiry, the Inspector had more evidence available to him, particularly in the form of the evidence from Mr Goodwin. Accordingly, when the Inspector considered the relevant question at the screening opinion stage under the first limb of art 6(3), he had a good deal more information, and more focused information, than will often be the case for a competent authority at the screening stage under art 6(3)."*

Interestingly, regulation and case law effectively provides an appellant against the grant of a marine licence (or planning permission for that matter) significantly more rights to review the assessment, while an interested party (environmental NGO or neighbour as examples) has no such right.

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[10] It is possible that this decision would be decided differently following People Over Wind and Sweetman v Coillte Teoranta (C-323/17) since mitigation can only be looked at following the Appropriate Assessment stage assuming that a likely significant effect has been identified.
[11] Per Sales LJ at para 86.